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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 133.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANT,

vs.

THE VICKSRURG WATER WORKS COMPANY, APPELLEE.

BRIEF OF APPELLEE ON MOTION TO DISMISS AND AFFIRM.

S. S. HUDSON,
Of Counsel.

MISSISSIPPI PRINTING CO., V'SBURG.

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MOTION TO DISMISS AND AFFIRM.

In the Supreme Court. October Term, 1905.

Mayor and Aldermen of the City of Vicksburg, Appellant.

vs.

The Vicksburg Water Works Company, Appellee.

Comes now Appellee by its counsel appearing in that behalf and moves the court to dismiss the appeal in the above entitled cause for want of jurisdiction or right of appeal direct from the United States Circuit Court where this appeal is taken from, because the only questions involved are questions that should be decided by the United States Circuit Court of Appeals, and the case should have been appealed to that court. Therefore this appeal should be dismissed.

2nd. Because said final decree appealed from was entered in strict accordance with the mandate of the Supreme Court of the United States dated the 7th. of April, 1902, in the case of The Vicksburg Water Works Company vs. The Mayor and Aldermen of the City of Vicksburg, 185 U. S. 65.

3rd. The case should be dismissed, because the assignment of errors, are not signed by appellant or its attorney.

4th. The case should be dismissed because the clerk's certificate on its face shows that certain exhibit is left out and therefore there is not a complete transcript of the record as required by the rules.

And said Appellee by counsel as aforesaid also moves the court to affirm said judgment or decree from which said appeal purports to have been taken because although the record may show that this court has jurisdiction of this appeal yet it is manifest that said appeal is frivolous and was taken for delay only.

HUDSON & FOX.
SMITH, HIRSH & LANDAU.
Attorneys for Motion.

STATEMENT OF THE CASE.

This motion finds its support in the fact that in 1886 appellant authorized by an act of the legislature of the State of Mississippi, to-wit, "to provide for the erection and maintenace of a system of water works to supply said city with water and to that end contract with party or parties to build and operate water works" contracted with the assignors of appellees for a period of thirty years to erect, maintain and operate a system of water works and supply appellant and its inhabitants with water for public and private use at stipulated prices fixed in said contract and that part of said contract pertinent to this controversy is as follows, to-wit:

"An ordinance to provide for a supply of water to the City of Vicksburg in Warren County, Mississippi and to its inhabitants contracting with Samuel R. Bullock & Company, their associates, successors and assigns for a supply of water for public use and giving the said City of Vicksburg an option to purchase said works.

1st Section. Be it ordained by the Mayor and Aldermen of the City of Vicksburg that in consideration of the public benefits to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty years from the time that this ordinance takes effect unto Samuel R. Bullock & Company, their associates, successors and assigns of erecting, maintaining and operating a sys-

tem of water works in accordance with the terms and provisions of this ordinance and of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg; Mississippi as they now exist or may hereafter be extended and within such other territory as may now or hereafter be under its jurisdiction for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for the conducting and furnishing of an adequate supply of good, wholesome water to the City of Vicksburg, Mississippi and to its inhabitants for public and private use and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

SOURCE OF SUPPLY.—Water shall be taken from such point as may be free from all sewerage contamination and shall be good wholesome water fit for all purposes of domestic or manufacturing consumption.

SECTION 3. In consideration of the public benefit and the protection of property resulting from the construction of said system of water works the Mayor and Aldermen of the City of Vicksburg hereby rent of the said Samuel R. Bullock & Co., their associates successors and assigns, not less than eighty double nozzle frost proof fire hydrants for the aforesaid period of thirty years at the annual rate of sixty-five dollars for each hydrant, to be payable semi-annually on the fifteenth day of January and July. After the first year of operation of said water works the said city hereby rents not less than ten hydrants in addition to the said eighty for the unexpired period of said thirty years; the first one hundred hydrants shall be located on the original twelve miles of main at said annual rental of sixty-five dollars, payable as aforesaid, and for the remainder of the said period of thirty years unexpired at the time of placing each of said hydrants.

The rental of all hydrants in excess of said one hundred hydrants hereafter erected on the line of distributing mains or the extension thereof as hereinafter provided at the request of the said Mayor and Aldermen of the City of Vicksburg shall be at the annual rate of fifty dollars for each hydrant payable as aforesaid during the unexpired period of said original term of thirty years. The water shall be used from said hydrants for the extinguishment of fires and necessary fire practice and for flushing sewers and gutters only, provided that for fire practice and flushing sewers no more than two hydrants shall be open at one time and not more than once in each week.

SECTION 4. Water shall be furnished free of charge to the public schools and to all other public buildings used exclusively for city purposes and for filling public cisterns and the City Hospital shall also be supplied with water free by a supply pipe whenever the mains shall be laid to within seven hundred and fifty feet of said hospital. Water shall be supplied free for six drinking fountains with openings for man and beast and one public fountain to be erected by the said Samuel R. Bullock & Co. in such place on the line of mains as the Board of Mayor and Aldermen of the City of Vicksburg may direct.

SECTION 6. Upon the completion of the construction of said system of water works the said Samuel R. Bullock & Company, their associates, successors and assigns shall notify the Mayor and Aldermen of the City of Vicksburg to that effect in writing and thereupon submit the works to such test as will show the capacity of the work to be sufficient to throw five fire streams through one hundred feet of 2½ inch hose and one inch nozzle and from four different hydrants, a stream not less than fifty feet high at the highest elevation on which any of such hydrants are located. On the satisfactory performance of this test the said Board of Mayor and Aldermen shall formally accept said system if constructed in accordance with the terms of this ordinance.

SECTION 9. At the expiration of the period of ten years after this ordinance takes effect the Mayor and Aldermen of the City of Vicksburg shall have the right and privilege to purchase said system of water works provided they notify the Samuel R. Bullock & Company, their associates, successors or assigns of their intention to do so at least one year before the expiration of said period of ten years.

The value of the said system shall be ascertained as follows: The said Samuel R. Bullock & Company, their associates, successors or assigns and the Board of Mayor and Aldermen of the City of Vicksburg shall severally appoint one person, the two appointees shall choose a third and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. None of the Board shall be residents of said Warren County. The said Mayor and Aldermen of the City of Vicksburg shall within sixty days after the said Board has rendered its decision pay the amount awarded in cash. A failure to so pay the award or give notice of intention to purchase as above provided, shall operate as a waiver of the right to purchase until the next succeeding period of ten years.

SECTION 11. After the works are put in operation if at any time the pressure gauges located at the points hereinbefore named shall indicate a pressure of less than twenty pounds on the distributing mains at the highest point of elevation for the period of two weeks in succession, then the rental for the use and employment of the hydrants for the purposes aforesaid shall cease until the standard of pressure in this section provided shall be attained, provided, however, if the pressure indicated as aforesaid shall be less than twenty pounds for two calendar months in succession then all the rights and privileges of the said Samuel R. Bullock & Company and their associates, successors and assigns acquired by virtue of this ordinance shall at the option of said Board of Mayor and Aldermen made in writing, cease and determine and be null and void, but nothing contained herein shall be so construed as to prevent the said Samuel R. Bullock & Co., their associates, successors and assigns, from temporarily shutting off the water from its said system or in operation thereof for the purpose of making repairs or extensions to the same and no liability shall attach to the said Samuel R. Bullock & Company, their associates, successors or assigns for the suspension of the supply of water provided the repairs are made and the water turned on again without unneccessary delay, but the city shall not be liable to pay the rental for any hydrant during such time as the proper supply of water cannot be procured therefrom.

SECTION 12. Be it further ordained that as a part of the consideration for the performance of the duties and obligations hereby imposed on the said Bullock & Company, their associates, successors and assigns, the said water works and the property and business pertaining thereto and employed in and about said system shall be exempt from all municipal taxation during the first five years of their operation and all of the property and business pertaining to and employed in and about said system of water works shall hereafter during each year of the balance of the period of this contract be assessed for taxation by said city at a valuation not to exceed the sum of fifty thousand dollars.

SECTION 13. Said Samuel R. Bullock & Company, their associates, successors or assigns shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and the general operation of the work and to make such rates and charges for the use of said water as they may determine, provided that said rates and charges shall not exceed fifty cents for each thousand gallons of water.

In August 1900 Appellee through a sale under a mortgage executed by Appellees predecessor, became the owner of the works and contract and ordinance made with the city. The city after receiving the benefits under said contract for a period of thirteen years without question or complaint on the 7th. of November, 1900, in council by resolution denied liability under the contract, declined to pay the price fixed by the contract and offered in lieu a reduced compensation for the use of water, to wit.

"At a regular meeting of the Mayor and Aldermen of the City of Vicksburg, Mississippi, held on the 7th. day of November, 1900 amongst other proceedings had at said meeting was the following to-wit: "Resolved, that the Mayor be and is hereby instructed to notify The Vicksburg Water Works Company that the Mayor and Aldermen deny any liability upon any contract for the use of water hydrants. That from and after August, 1900 they will pay reasonable compensation for the use of said hydrants. That the City Attorney take such action as shall be necessary to determine the rights of the city in the premises.

H. J. TROWBRIDGE, City Clerk."

See Record p. 30.

On the 18th. of March 1900 the legislature of Mississippi passed an act to authorize the Appellant to issue bonds in the sum of three hundred and seventy-five thousand dollars to purchase or construct, equip and maintain a water works system in the City of Vicksburg and for other purposes and the Appellant held an election under said act as directed by it on the 3rd. of July 1900 which election resulted in a vote to build or buy a water works plant of its own.

On February, 1901 Appellee repudiated in toto and asserted that no contractual relations existed between the parties hereto and declined to recognize the Appellee.

On the commission of these several acts Appellee filed its bill in the United States Circuit Court of Mississippi asserting jurisdiction in that tribunal mainly because appellant in passing the resolution of the 7th. of November, 1900 and February, 1901, and in holding an election to issue bonds to build or buy a water works plant of its own violated Article 1, Section 10 of the Constitution of the United States in this, that "no state shall * * * pass any law impairing the obligation of a contract."

The city demurred to the Bill of the company for the following reasons:

(1st.) Because said court was without jurisdiction of said suit because the acts complained of by the company committed by the said city are not such acts as are in contravention of the company's contract rights, nor does it require the construction of the Constitution and laws of the United States.

(3rd.) Because the city did not have the power to make an exclusive contract for the period of thirty years, and it was beyond their power to bind the constituted authorities for that length of time.

(4th.) Because by the terms of said contract it was not assignable but personal to appellee's assignor.

(5th.) Because by the charter of said city it is without the power of said city to make any contract with that of another where the value of the same exceeded five hundred dollars without first advertising for bids as required by said charter.

On filing said demurrer the defendant also filed an answer denying the fact. Hearing the complaint upon the pleadings as set out, the trial judge dismissed the bill because he did not think that the city had committed any act violative of Article 1, Section 10 of the Constitution of the United States either on account of the passage of the resolution of the 7th. of November, 1900 or by holding an election under the acts of 1900 to build or buy water works of its own.

From this adverse holding the water company obtained the certificate of the court and appealed direct to the Supreme Court of the United States. That court in an exhaustive opinion rendered the 7th. of April, 1902, Vol. 185, p 65, reversed and required the trial judge to retain the bill, and to proceed with the cause in accordance with the mandate of that Court. Testimony was taken pro and con and the able Circuit Judge at Jackson, Mississippi, in court on the 18th. day of May, 1904 upon argument upon the law and merits of the case decreed for the appellee in strict accordance with the mandate of the Supreme Court.

From this final decree the city sues out this appeal to this court and assigns as its legal reasons for so doing the following assignment of error.

ASSIGNMENT OF ERRORS.

Vicksburg Water Works Company, Complainant,

vs.

The Mayor and Aldermen of the City of Vicksburg, Respondent.

Now comes the respondent and files the following assignment of errors upon which it will rely:

1st. That the United States Circuit Judge erred in allowing the said Water Works & Light Company to withdraw its petition filed in said cause on December 2nd., 1903 whereby it prays to be admitted as a party complainant and also in allowing the said City Water Works & Light Company to withdraw its original bill in the nature of supplemental bill filed in said cause on the ——— day of May, 1904, and the said court erred in allowing the Complainant to withdraw its consent to the filing of said petition and the said original bill in the nature of a supplemental bill authorizing the withdrawal of said several papers being in words and figures as follows, to-wit:

This day came on to be heard the motion of the City Water Works & Light Company to withdraw from the files its petition herein filed December 2nd. 1903 and its original bill in the nature of a suupplemental bill filed the 8th. of May, 1904 with all exhibits and the motion of the Vicksburg Water Works Company to withdraw from the files its written consent to the filing of said bill, and the court being fully advised in the premises doth hereby order, adjudge and decree that leave be granted as prayed for to withdraw said petition, bill, exhibits and written consent.

2nd. The court erred in refusing to allow respondent to file a supplemental answer setting up that the said City Water Works & Light Company was an essential party complainant and that unless it should be made a party complainant the court could not proceed but must dismiss the bill.

3rd. The court erred in refusing to continue said cause on the motion of respondent after he had permitted the City Water Works & Light Company to withdraw its petition and its original bill in the nature of a supplemental bill whereby it sought to be named a party complainant in said

cause and after it had permitted the complainant to withdraw its consent for the City Water Works & Light Company to be made a party complainant.

4th. The court erred in granting the complainant's motion to strike from the evidence interrogatories number 135-136 137-138-139-140-141-142-143-147 propounded to witness M. O. Crumpler and the answers thereto and the said interrogatories and answers being as follows, to-wit:

Cross Int. 135. Mr. Crumpler what has become of the corporation heretofore existing and known as the Vicksburg Water Works Company, have you surrendered your franchise?

Ans. We have not; it has simply sold out what property it had to the City Water Works & Light Company.

Cross Int. 136. It has no property of any kind whatever?

Ans. No sir.

Cross Int. 137. What business is it now engaged in carrying on?

Nothing.

Cross Int. 138. How long since it has been engaged in carrying on business or owned any property?

Ans. First of December, 1903.

Cross Int. 139. What corporate act or acts, if any has it done since the 1st. of December, 1903.

Ans. I don't know of any except in winding up its business.

Cross Int. 140. If it has no property and is carrying on no business what further business has it to wind up?

Ans. It is winding up the accounts that belong to the company.

Cross Int. 141. It does then, as a matter of fact, still own some accounts and claims against people?

Ans. Yes, sir.

Cross Int. No. 142. Then when you said that it had no property you meant that it had no tangible property. I mean that it had no water works or anything of that kind.

Ans. Yes, sir.

Cross Int. 147. You are the manager of the new com-

pany, The City Waterworks and Light Company the same as you were the manager of the old company; The Vicksburg Waterworks Company are you not?

Ans. Yes, sir.

5th. The said court erred in rendering final decree against Respondent because said decree is contrary to the law and the facts as stated in the pleadings and proof before said court.

6th. Said court erred in perpetuating by its final decree the injunction against Respondent restraining it from building a water works plant of its own.

7th. The court erred in granting a mandatory injunction against Respondent commanding Respondent within one year to build and construct a sewer whereby the sewer now existing on Washington street in the City of Vicksburg should be extended and made to discharge at some point on the Mississippi River south of the intake of Complainant.

In order that the foregoing assignment of errors may appear of record Respondent presents the same to the court and prays that such disposition be made thereof as in accordance with the law and the statutes of the United States in such cases made and provided, and that upon hearing the said final decree may be reversed and said cause remanded, all of which is respectfully submitted.

Solicitors for Respondent.

The manifest office of the motion to affirm or dismiss if I intelligently conceive the dictum of the court upon the subject, is to prevent and discountenance the arbitrary exercise of the right of appeal and loading up the court docket with foregone affirmances that "a wayfaring man though he be" could understand that that there is no merit in the appeal, but that it is done to prolong the fatal crisis as well as delay the vital and beneficial result to the Appellee, inflicting upon it pecuniary injury, depriving it of the use of its money or property by such suspensatory and dilitory pretext, with no regard for the taxation they impose upon the court and the judges in the time they consume in the consideration of such *frivolous* appeals,

thereby defeating the very victory and benefits Appellee had derived from the decree. It is for these reasons that I understand that the court notifies the Appellee to command its attention to the perpetration of a motion to dismiss or affirm for such abuses exercised under the right of appeal. Conceiving this to be the righteous mission of this beneficient motion I confine myself to a pertinent discussion of its merits here.

FIRST AND PARAMOUNT, that no appeal is authorized by law direct to the Supreme Court from the District or Circuit Courts in this case.

The Act of March 3rd, 1891 lays down the following grounds upon which appeal can be taken direct to the Supreme Court from a Circuit or District Court.

SEC. 5. "In any case in which the jurisdiction of the court is in issue: in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

"From the final sentences and decrees in prize causes."

"In cases of conviction of a capital crime."

"In any case that invokes the construction or application of the Constitution of the United States."

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

"In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

We submit that no reasonable construction can be placed upon this statute that will warrant an appeal direct to the Supreme Court from the Circuit Court in the attitude that this case was, when this appeal was taken. And if not, the case should be dismissed on this motion.

We submit further, that all the laws and Acts both State and municipal involved in this case that would warrant an appeal direct to the Supreme Court from the Circuit Court for adjudication, as to whether they were in contravention of the laws and constitution of the United States *have already been decided* in this identical case by this court.

Vicksburg Water Works Co., vs. Mayor and Aldermen of Vicksburg, 185 U. S. 65.

The court held: after citing the facts in the case: "It cannot be seriously contended that, under the Act of March 18, 1886, authorizing the City to provide for the erection and maintenance of a system of water works, and to contract with a party or parties to build and operate water works, and under the ordinance of the City of November 18, 1886 providing for a supply of water to the City and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the City to make; the terms were explicitly set forth in the Ordinance; the works erected were appoved by the City, and the respective obligations created by the contract were duly complied with, without question or complaint, for a period of fourteen years."

"After the lapse of that long period and the continuous acquiesence of the city in the contract as a valid and subsisting one, the city according to the allegations of the bill, now insists that the said contract was invalid because in excess of its powers to contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the complainant for the custom of the consumers of water. And the question for our consideration is whether the subsequent legislation, State and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States."

The court then further held: "That the ordinance of the City of November 7, 1900, whereby the Mayor was instructed to notify the Water Works Company that the Mayor and Aldermen deny any liability upon any contract for the use of the water works hydrants, and the subsequent action of the City in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be

remedied by action at law, but disclose an intention and attempt, by subsequent legislation of the City, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the City can point to some inherent want of legal validity in the contract, or to some such disregard by the Water Works Company of its obligations under the contract as to warrant the City in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a federal question."

Thus it will be seen that all the questions involved in this case, in which an appeal can be taken to this court direct from the Circuit Court, have already been decided by this court; therefore no further appeal lies direct to this court from the Circuit Court. We submit, that the *only* appeal appellant had from the final decree on its merits in the Circuit Court in this case, was to the Circuit Court of Appeals. Certainly there is no law authorizing *this* appeal in the attitude this case is in; and we respectfully submit that the case should be dismissed for want of jurisdiction; or the right of appeal direct from the Circuit Court.

2nd. Appellee insist that the case should be dismissed, because the clerk's certificate on its face shows there is not a complete record, wherein it excepts a certain exhibit. Rule 8, of the Supreme Court, paragraph 3, reads: "No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, deposition and other proceedings, which are necessary to the hearing in this court, shall be filed."

3rd. There is no assignment of error. Rule 35 of the Supreme Court requires the appellant to specifically set out an assignment of errors separately and particularly each error asserted and intended to be urged. The document with the caption "Assignment of Errors" is not signed by the appellant the Mayor and Aldermen or by its attorneys, therefore it is a mere piece of paper without force or effect and it cannot be considered,—hence, the case should be dismissed.

4th. If the assignment of errors has force and effect without signature of appellant, it specially shows that the

city does not set out a single ground which authorizes an appeal direct to the Supreme Court from the Circuit Court or District Court. See the following cases in support of a motion to dismiss or affirm :

Whitney vs. Cook, 99 U. S. 607.
Hinckley vs. Morton, 103 U. S. 764.
Micas vs. Williams, 104 U. S. 556.
Swope vs. Leffingwell, 105 U. S. 3.
Channte City vs. Trader, 132 U. S. 210.

And the cases cited in the case of Chanute City vs. Trader, 132 U. S. 210, and especially the court's good solid reasoning in the last case cited, on the grounds of a frivolous appeal and for delay only ; which is especially applicable to this case.

5th. Appellee insists that there is not a single assignment of error asserting that the Circuit, or District Court erred in passing upon a question which involved the construction of the Constitution and laws of the United States or a law of the state or a municipality that was in contravention of the Constitution of the United States or that any is claimed to be in contravention of the Constitution of the United States or that the jurisdiction of the court is in issue. Without these assignments, or a part of them, fully and plainly set forth, no appeal lies under the act of the 3rd. of March, 1891 direct to the Supreme Court of the United States from the Circuit or District Court. Therefore the case should be dismissed.

We submit again that the legislative acts both state and municipal, that are involved in this case have already been construed by the Supreme Court of the United States in this case, or enough of them to determine the case. The court held in delivering its opinion in the case that the ordinance of the City of the 7th. of November, 1900 whereby the Mayor was instructed to notify the Water Works Company that the Mayor and Aldermen deny any liability upon any contract for the use of water works hydrants and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own and refusing to pay the amount due and payable under the terms of the ordi-

nance do not present the mere case of a breach of private contract to be remedied by action at law but discloses an intention and attempt by subsequent legislation of the city to deprive the complainant of its rights under the existing contract. The lower court's decree is strictly in accordance with the Supreme Court's mandate, and therefore the case should be dismissed.

If the lower court's decree is strictly in accordance with the Supreme Court's mandate a second appeal will not be sustained.

A. M. Smelting Co vs. Billings, et. al., 150 U. S., 29.
Mackall vs. Richards, 116 U. S., 45.
Stewart vs. Soloman, 97 U. S., 361.
Humphreys vs. Baker, 103 U. S., 736.
U. S. vs. N. Y. Indians, 173 U. S, 464.
Tyler vs. L. C. Mine, 97 Fed. R., 394.
In-Re Pike, 76 Fed. R., 400.
Gregory vs. Pike, 77 Fed. R., 241.

In the above cases the court says: "An appeal will not be entertained by this court from a decree entered in the circuit court or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree when entered is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken however, we will, upon the application of the appellee examine the decree entered and, if it conforms to our mandate, dismiss the case with costs."

CONCLUSIVENESS, OF PRIOR DECISION ON SECOND APPEAL.

In Illinois ex. rel. Hunt vs. Illinois C. R. Co., 184 U. S., 77, 91, the court says: "Whatever was, before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided upon appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. After mandate no rehearing will be granted * * * * And on a subsequent appeal nothing is brought up but the proceeding subsequent to the mandate."

The Supreme Court in its deliverance in the Vicksburg Water Works case making an analysis of the trouble pre-advised the lower court to the effect that if the company proved its allegations as made in the bill that its contract was within the Constitution and laws of the United States. Since that deliverance there have been no questions arising in this case that in any sense involves a further construction of the Constitution and laws of the United States.

Then if these Federal acts have been previously determined in this case these appellants must appeal to the Circuit Court of Appeals from the District Court and not to the Supreme Court of the United States, if they appeal at all. If the trial judge had overruled the city's demurrer to the bill and retained jurisdiction and put the parties to trial on the merits and on the final hearing decided the case adversely to the city then she could have appealed directly to this court.

See Walla Walla vs. Walla Walla Water Co., Vol. 172, U. S., p. 1.

The 6th assignment of error is as follows: "The said court erred in perpetuating by its final decree the injunction against respondent restraining it from erecting a water works plant of its own," this question was suggested by the Water Works Company on the first appeal to the Supreme Court of the United States in this case and this court then held that the city could not build in opposition to its contract made.

It would seem that this effort on the part of the city to continue to raise these adjudicated questions is either to insist upon this court to reverse itself or that it is still unable to comprehend the scope and effect of the opinion.

My long and continuous connection with this case has convinced me that this appeal was taken but for one purpose and that is expressed in the original bill filed four and a half years ago, which is a follows: "Your Orator further shows that the said city and its officers confederated and conspired to injure and destroy the value of its property assumed to abrogate and take away franchises and contract rights of said company while denying its (said city) liability to pay for water used by them as pro-

vided in said contract and ordinance and persistantly and unlawfully endeavored to disable said company from carrying on its business and to destroy its credit and the value of its property and to coerce said company to sell its water works to the city for an inadequate price."

In the first place the city demonstrated a spirit of oppressiveness when it by legislative act undertook to place an arbitrary price and value upon the company's property because it knew the company was forever buried in the earth and must do its master's bidding at any cost. Conceiving this to be her advantage, stripped of the magnanimity that is due from a government to its creature she importunes the legislature of Mississippi to dictatorially say to the company it shall take the price of one hundred and fifty thousand dollars or I will destroy you with my own water works. After this company had been in operation for thirteen years without question or complaint from the city, like Rip Van Winkle, she suddenly awakens from her long sleep and is imbued with the belief that the company is a robber. Why this sudden revulsion and disunion of friendship that Damon and Pythias had found in each other? It is because the city wanted the water works at its own price.

We find on page 21 of the record that L. W. Magruder, Esq., is one of the incorporators of Appellees predecessor who purchased the contract of Bullock & Company and whose company, as the bill alleges, owned and operated the contract for thirteen years, yet we find this same person leading the legal fight against Appellee's contract it purchased under the mortgage of the company Magruder and others organized and operated the contract with, and alleging in the bill filed by him for the city in the Chancery Court of Warren County as follows:

"Complainant further shows that the contract entered into with Samuel R. Bullock & Co. on the 18th day of November, 1886, is null and void and the attempt by the said Mayor and Aldermen to make such a contract was a gross abuse of their rights and powers. That the said Mayor and Aldermen had no right to make a contract for so long a time as thirty years and beyond the life of their official

term to bind the constituted authorities of said city to pay rents for the said hydrants as therein stipulated. That whatever may have been at the time a reasonable and just compensation to be paid to said Water Company for said hydrants, such payment is now excessive and unjust to charge and an extortionate burden upon the tax payers of said city. Complainant further shows that the 25th section of the charter of the City of Vicksburg which was in force at the time of making said contract, itself provided that said Mayor and Aldermen shall not make any contract involving an expenditure of corporation funds relating to work on public streets or the erection, extension or repairs of public buildings where the cost of the proposed work shall exceed five hundred dollars or for materials to be furnished exceeding two hundred dollars in value except upon advertisement duly made for sealed proposals for such work.

"Nevertheless said Mayor and Aldermen entered into said contract whereby the said terms were imposed upon said city for the period without any advertisement for sealed proposals as provided by law by reason whereof said contract was unauthorized and is illegal and void.

"Complainant further shows that by the terms of said first section the said Mayor and Aldermen attempted to grant and did grant unto the said Samuel R. Bullock & Co. the exclusive right and privilege for the period of thirty years of erecting and maintaining and operating a system of water works within the corporate limits of the City of Vicksburg for the exclusive use of the streets, alleys and public squares of the said city for that purpose and for the purpose of supplying water to the City of Vicksburg and its inhabitants for public and private use. That the said Mayor and Aldermen had no right or power to make such contract; that an exclusive grant by a municipality of the kind is in contravention of the public policy of the state and is illegal and void."

These defences are reiterated by the city in its answer filed in this court, signed by Magruder as an attorney for the city and it was unkind of him to advise the city of these glaring legal defects in the contract that he and

others had received benefits under so long. However reluctantly and involuntarily he may have furnished this information to the city, it certainly besmacks of a malicious design to make war for revenge.

Appellee calls special attention to a portion of the City's answer, on p. 70, wherein it avers:

"Your respondents admit that the averments in said bill that an Act of the Legislature was passed authorizing the City of Vicksburg to issue bonds for the purpose of constructing a City Hall and a Sewerage System and also for the purpose of either purchasing or building a water works system and authorizing the issue of one hundred and fifty thousand dollars ($150,000.00) for the latter purpose, *but respondents say the question of liability of the City to complainant by virtue of the contract entered into with Samuel R. Bullock & Co. which is raised by said resolution is altogether aside from the scheme and purpose of becoming the owners by purchase or otherwise of a system of water works, they say that said alleged contract * * * impose upon the inhabitants of Vicksburg and its corporate authorities an onerous and extortionate burden, that no such contract would now be made with the Vicksburg Water Works Co. or any other company at the rates prescribed in said ordinance, that they far exceed the average price charged for water in cities situated in like condition and circumstances to Vicksburg.*"

If these averments are true, and they are so far as they effect this case, the City does not want to become the owner of a water works system by purchase or otherwise.

Then why contend further about her right to build?

The averments are clear and distinct that the whole question of controversy is on account of the onerous and extortionate rates both upon the inhabitants and the City. What do we find in the evidence to support the "Onerous and Extortionate Rates." We defy the City to point to one word in support of it, or any effort to support it. Yet she avers most positively that, "onerous and extortionate rates" are the whole cause of this complaint. The "whole cheese" so to speak, and forgot it.

The Water Company proved its hydrant rentals, rates,

rules and regulations were reasonable. The City made no attempt to disprove it, or to put in any proof of her own on this, [the only question involved.]

The question naturally arises what is this suit about? What is the contention? One of the answers is, the City can purchase under the option in 1906 [" and has already given the Company notice she intends to do so "] and she can put these facts before the appraisors that this *great suit* was still pending before the Supreme Court with all the questions undecided.

We say therefore it is a frivolous appeal, without any merit upon the entire record and is taken for delay only. This case, we respectfully submit, should be disposed of on this motion, either by dismissal or affirmance under such facts and proof as appears in this record.

Passing from this epoch in the history of this case we reach the evidence in the case and turning to the declarations made to the company by Mr. Kelly and Mr. Smith and others who were at the time aldermen of the city, they and all aldermen whose public integrity has to become so depraved as to openly assert "that the city wanted to get the plant for one hundred and fifty thousand dollars and that the city council intended to do everything in their power to harass and annoy the company so as to make it sell at that price and that the company might expect the council to do everything they could to break the contract. Alderman Smith told the company that the city would never buy the plant under the option of the contract because they would not pay as much for it as they would have to pay for it that way.

Alderman Campbell stated in open session at the city council that he was opposed to building a sewerage system in the city for the reason that it would *enhance* the value of the water works plant.

Also the questions asked Mr. Crumpler by the City Attorney, Record page 290, Int. 235. "Then the fact that the City had not up to this day, done any act or passed any resolution showing that it had made an election as to whether it would buy or build under the

said law, so far as you know, may have been for the purpose of buying the water works as *cheap as possible?*
Ans. Yes sir.

As a matter of fact, don't you think all the acts done by the City might be explained in that way—that the City desired to purchase at the lowest possible price."

Ans. *That might have been their intention, but I think if it was, it was a very unjust one, to repudiate a contract to get another man's property cheaper than its value."*

See Record p. 266.

Well might our forefathers who gave us the Federal Constitution to protect rights looking down the ages of time see just such barbaric greed emanating from such oppressors as Kelly, Campbell and Smith and well did they shelter the oppressed otherwise like unto King Charles, "Thy will is law," but no longer can autocratic power live in the face of this palladium of liberty whenever the purposes to deprive one of his own without right and by might this great Federal Sampson intervenes and like the father of us all places its hand upon the erring child's ways and forbids further transgression. Surely these aldermen in their conduct represented the controlling political wishes of the city and were governed by its popular feeling. The most striking feature in my judgment of this unprovoked assault is the despisable and cunning method by which the city was to absolve itself from the contract.

Section Eleven of the contract is as follows: "After the works are put in operation if at any time the pressure gauge located at the points hereinbefore named shall indicate a pressure of less than twenty pounds on the distributing main at the highest point of elevation for the period of two weeks (2) in succession then the the rental for the use and employment of the hydrants for the purpose aforesaid shall cease until the standard of pressure in this section provided shall be attained. **Provided, however, if the pressure indicated as aforesaid shall be less than twenty pounds for two calendar months in succession then all the rights and privileges of Samuel R. Bullock & Company, their associates, successors and assigns acquired by virtue of this ordi-**

nance shall at the option of said Board of Mayor and Aldermen made in writing cease, determine and be null and void."

With this section in view the city provided itself with a recording gauge to keep the daily pressure of the water and located it in one of the public fire engine houses. Just beneath the gauge is a stop cock located in the pipe to adjust the pressure of the water against it in order that the guage might keep a false record of the pressure. The city through its servants so arranged the stop cock as to prevent a free and full passage of the water to the guage and this practice was continued until they were detected and required to keep an honest register. The evident purpose of this act was that if they could, without detection keep a paper record of the gauge of this water for two months showing that it was below the minimum pressure for that time that as a matter of fact would absolve them from the contract. See answer and interrogatory 18, M. O. Crumpler's deposition, page 265 of Record. Also see the Company's notice to the Board of Mayor and Aldermen advising them of the fact of the false register of the pressure of the water at this gauge, Record, p. 302.

Just succeeding this testimony we find that being forestalled in obtaining the relief from the contract through the gauge, the fire chief of the city, appeared as the Iago of this drama and Poseidon like casts his trydent upon the ground and thereby systematically sets about to minimize the water pressure whenever there was a fire by failing to pull open the hydrants so that a full pressure might be obtained and so that it, the fire, might do its ravages and destroy the property and thereby arouse this embittered feeling of the citizens to action and do violence to the personal management of the company and forcibly dispossess him. Fortunately the insurance companies who were the losers took a secret hand in the detection of this wholesale destruction of property by fire and after mature investigation determined that it was not the lack of pressure of water but was a deliberate design on the part of the Chief to destroy the work, consequently by the demand of the united effort of the Insurance Companies

doing business in the city he was dismissed as Chief of the Fire Department and not permitted in any sense to be connected with the department. To do this, in the language of Milton, one would steal the livery of Heaven to serve the devil in hell. These facts and acts are recited not for the purpose of proving the guilt of the city but to show that one who will resort to such methods to effect absolution from a binding and valid contract *will take a frivolous appeal for delay.*

Appellee calls special attention to the fact that the charts which shows the pressure carried by the Water Company for over fourteen years, shows beyond question that the pressure was never below the required pressure for a period of two weeks, while under the contract it could have been two months before forfeiture of the contract. The charts are before the court and we defy the city to show to the contrary.

It will be noticed that the city in its answer at page 7 says that before the question of building a sewerage system and water works can be obtained by them they deem that it is proper that there should be settled their liability if any under said contract. They consider that it is their duty as public servants to test such question not only because of the onerous terms of said contract but also because the public welfare requires that said question be settled for they might justly conclude that it would be unwise to build a system of water works in case it should be decided that they are bound by said contract though they may have the legal right to build. Record page 72.

Also at page 69 and 70 we find the city making the following allegation: These Respondents deny that the water which has been furnished by the said Water Works Company since they acquired the ownership thereof has been "**good wholesome water** fit for all purposes of domestic or manufacturing purposes."

"On the other hand they aver that said water has for the most part been charged with mud, sediment and other deleterious matter injurious to the health of the people who use the same and unfit for domestic use. They deny that the Vicksburg Water Works Company has kept and

maintained a pressure against its mains to the extent stipulated and required in said contract with Samuel R. Bullock & Compauy. That for the failure of said company to comply with said contract in respect to the quality of water to be furnished and in respect to the pressure required to be maintained upon said mains these Respondents say that the Complainant is not entitled to any relief by virtue of its terms and that these Respondents are released from its obligation."

Further on the city says: "also said contract imposes upon the inhabitants of Vicksburg and its corporate authorities an onerous and extortionate burden, that no such contract would now be made with the Vicksburg Water Works Company or any other company at the rates prescribed in said ordinance and that they far exceed the average price paid for water in cities situated in like condition and circumstances to Vicksburg."

From the tone of this defense by the city it would seem that the city would be anxious to determine this controversy for the health, welfare and pocket book and finances of the city as she alleges, but on the contrary some very dilitory methods have been employed to defeat the final determination of the case. For instance, this case was decided and a final decree rendered by the trial judge on the 18th day of May, 1904. See Record p. 365. There was ample time to have appealed the case and docketed it for the October term 1904 of this court, but arbitrarily claiming the time allowed by the statute within which to take an appeal from final decrees, none was asked for until the 9th day of November, 1904. See petition for Appeal Record p. 369, thereby permitting the October term 1904 of this court to pass without perfecting the appeal. This tactful method created twelve months delay and the case cannot be docketed now for action until the October term 1905, and as they possibly thought in making this move and appealing directly to this court the city realized that this court was more than a year behind and that this case could not be reached on its regular call until October, 1907. In the meantime, the company must lose its bills and suffer financially in every other way, and notwithstanding the fact the com-

pany has won the case, yet by reason of the exercise of this arbitrary action on the part of the city in taking this frivolous appeal, the company must suffer as though it had lost the case and is itself appealing. The authorities of this court sustaining this view are:

Mecas v. Williams, Vol. 104, U. S. Reports, p. 556.
Swoop v. Leffingwell et al., 105 U. S. p. 3.
City of Chounte v. Troder, 132 U. S. p. 210.

There are some other legal questions involved in this appeal as presented by the assignment of errors but they are no more than ordinary legal questions and are not such as that this appellant may be permitted to avoid the United States Circuit Court of Appeals and seek relief here in the first instance; for instance, it was especially agreed by counsel on both sides and upon said agreement it was ordered by the court on January, 1904, that the case should be tried as it then stood on final hearing in May, 1904, at Jackson, Mississippi, although the city had notice of the assignment on December, 1903, Record p. 110.

See agreement and Court's order, Record p. 109.

Besides it was in the discretion of the court at that stage of the case not to allow the supplemental answer filed and granting further time to take testimony. See Rule 60 Equity, and cases cited.

RATES, RULES AND REGULATIONS.

"These subjects are fixed by contract and cannot now be disturbed, but considering that they could be, the undisputed testimony shows that they are reasonable and not in contravention of the contract or law." Los Angeles vs. Los Angeles Water Company, 177 U. S. page 558.

POLLUTION OF THE WATER BY THE CITY.

The court in perpetuating the injunction in this case is asked to restrain the city from using the underground gutter or storm sewer on Washington Street, of the defendant as a sewer for excremental matter from private residences, hotels, business houses, etc., in order that this contract may be performed. At the time the water works pumping station was located, the gutter or

sewer was used to carry off surface water from Washington Street and the streets crossing Washington Street in time of hard rains, and prevent it from flooding the stores on the West side of Washington Street. This sewer emptied into Lake Centennial. The contract between the city and the water company provides that the source of water supply shall be at a point free from sewerage contamination. When the pumping station was located it was at a point free from contamination by sewerage. Subsequent to the location of the pumping station and beginning of the operation of the works, the city council permitted stores and hotels along Washington Street to connect with this storm sewer and use it for the disposition of excremental and other sewerage matter, and the use of it for this purpose has assumed such proportions as to be dangerous to the health of the community, and the court should restrain the city from allowing the further use of this gutter for such purposes. I find several parallel cases, three of which I will refer to.

First: Platt Bros. & Co., vs. City of Waterbury, 721 Conn. 531, 48 L. R. A. 691. The facts are these: The plaintiffs owned and operated a mill by water power on the Naugatuck River below the city of Waterbury. When the city had grown to proportions as to require sewerage, its inhabitants constructed a system under an act of the Legislature which authorized the outlet at a point in the Naugatuck River above plaintiffs. On account of the increased growth of the city the sewerage discharge became so great as not only to destroy the primary use of the water, but to prevent as well, plaintiff's from using it at their mill for manufacturing purposes. The plaintiff's brought suit for the damages sustained and asked for an injunction restraining the city from using the river for such purposes. The court awarded damages to plaintiffs and perpetually enjoined the city from polluting the water and held further that the city, although acting under the author-

ity of the legislative grant and in the exercise of a governmental function, could not escape liability where it had damaged a riparian owner; that it was beyond the power of the legislature to authorize a nuisance and perpetrate such monstrous injustice. The court held further that such an act was unconstitutional, because no one's property can be taken by legislative grant or otherwise for public purposes until just compensation can be made.

In the case of Dwight vs. Hayes, 150, 111, 273, 37 N. E. 218, the court held: "Equity will enjoin the pollution of a stream by the discharge of city sewerage therein rendering the water unfit for domestic use, or for the drinking of domestic animals."

In the case of Roff vs. Lagrange, 158, 111, 21, 42 N. E. 77, the court held;

A municipal corporation cannot empty its sewerage into a stream of water where the result is the pollution of the stream, and a bill in equity to restrain the nuisance will lie in behalf of any person injured.

These cases only reiterate the sustained contention of complainant since the damage began.

Why should the city in the instant case be permitted to destroy this water works system, and in addition compel it to respond in damages for injuries sustained on account of the pollution of the water and forcing it to construct costly preventives and operate them at great expense in order to protect the health and lives of the inhabitants of the city.

Mr. Justice Shiras in speaking of equity jurisdiction in cases of threatened injury says:

"We cannot accede to this contention (that no steps have been taken to injure complainant, and injunction cannot be granted.) It is often made in cases where bills in equity are filed to prevent anticipated and threatened injury, where the damages would be insufficient or irreparable. But it is one of the most valuable features of equity jurisdiction, to anticipate

and prevent a threatened injury. The exercise of such jurisdiction is for the benefit of both parties.

It is evident to the court's mind that a sewer of such great dimensions carrying off the sewage of the most populous part of a growing city, is a great detriment to the health and lives of all the people using the water contaminated by such sewage—in this case nearly eighteen thousand people; and the operation of it should be suppressed without reference to who is to blame for its operation. Complainant addressed a petition to the defendant four years ago, asking that this use of the storm sewer be discontinued. The testimony and this petition show the sluggard disinclination of the defendant to remedy this state of affairs and a total disregard for the public welfare, and show the importance of some action by this court. In numerous cases on this question the substance is, "the power of the courts extends to the protection of the lives, health and comfort of all persons, and the protection of all property in the state; and persons and property are subject to such restraint as will secure the general comfort, health and prosperity."

Wholesomeness of Water.

There are some allegations in defendant's pleadings regarding the character of water furnished by this complainant. The character of water delivered to the public fire hydrants for fire purposes may be muddy and unwholesome and yet be sufficient to put out fires. In the State Trust Company of New York vs. Duluth, 73 N. W. 249, the court says:

"If the water that the company furnished the city through their fire hydrants, was a proper supply of water for fire protection purposes, the fact that the company failed to furnish water fit for domestic purposes would be no defense to an action against the city to recover the rentals for fire hydrants.

Manifestly this should be the law in such cases, be-

cause the wholesomeness or unwholesomeness of the water does not disqualify it for the use for which it was intended and is being used by the city. Whether it is wholesome or not is important.

In the case of Commonwealth vs. Towanda Waterworks, 15 Atl. Rep. 440, the court in determining the meaning of the word "Wholesome" as applied to water, says:

"If the term "pure water" as found in the Act of 1874, is to be taken in the absolute sense, then is that Act absurd and useless; for we all know that the only possible way to obtain pure water is by distillation. Water is an absolvent and a solvent, so that it can neither pass over the earth nor pass through the atmosphere without contracting impurity. How, then, could the Towanda Waterworks Company deliver "pure water" to the inhabitants of Towanda, when such was not to be found in the Heavens above, nor in the earth beneath? But even comparatively pure water is hard to be obtained in large quantities, for in populous sections of the country, where waterworks are mostly needed, neither rivers or smaller streams can be kept entirely clear of sewerage. Melting snow contaminates them, and rains fill them with mud. The very mountain streams are not free from pollution, nor even the springs that flow from the rocks. These are matters of common observation, and we do not need experts to inform us of them. If we are not to utterly frustrate the acts of the assembly, we must construe the words "pure water" to mean wholesome, ordinarily pure. We must use as it is used by the world at large, and not in the abstract or chemical sense. It is only in this manner that we can reach the legislative intent, and make the act economically valuable. Under the rule—the rule of sound common sense—we can entertain no doubt of the rectitude of the judgment of the court below. The judgment is affirmed."

Defendant rhetorically alleges that the water was

so charged with mud that it was unfit for use and not "good wholsome water for all purposes of domestic and manufacturing consumption" as contracted for. Looking to the context of the whole contract, we find first; that the water to be delivered must be taken from a point free from sewerage contamination. It could not have referred to an Artesian well, for that could not have a point in the sense in which the word is used here, nor could it be affected with sewerage contamination. Continuing, we find that the contract was printed originally, and it read "good, wholesome, clear water"; but before the contract was executed the word "clear" was stricken out with a pen and ink. The Mississippi River is always muddy and never clear; and at the time of executing this contract there was none of the modern methods of filtering water on a large scale: Thus it is clearly demonstrated that the Mississippi River was the only source of supply in contemplation when the contract was made.

Admiting, however, that the water is discolored, does that fact effect its wholsomeness, whether it is filtered or unfiltered.

All the witnesses who testify on this subject repudiate and disprove such contention. Who are these witnesses:

First: J. M. A. Brennan, one of our best citizens, who has resided here all his life, and who had used filtered and unfiltered water at his home for drinking purposes since the installation of the water works plant. He says that it is good wholesome water, and health of Vicksburg compares favorably with any city.

Second: E. S. Butts, the most prominent banker in Vicksburg, and who is more thoroughly identified with its interest and material prosperity than any other man in the city. He tells you that the water is wholesome and that the city enjoys as good health now, as it did before the installation of the waterworks plant.

Third: D. H. Herman, who has lived in Vicksburg

fifty years, congratulates Vicksburg on its wholesome water now, and thinks it is superior to any.

Fourth: Charles Linstrom, the Master Mechanic of the Yazoo & Mississippi Valley Railroad Company, with an average of four hundred men under his supervision, says that the water is not only good for making steam, but that it is good for drinking water. Surely, if the water was otherwise, one with such an army of men under him would by this time have discovered any delecterious effect it might have upon the stomach, and would have discarded it as unwholesome, because such a business could not afford to use water dangerous to health.

Fifth: F. Streuby manager of Lever Bros. Oil Mills, and a resident of Vicksburg for many years. Necessarily the superintendent of such a plant means a varied practical experience with waterworks for both domestic and manufacturing purposes, and when such staunch business characters as Mr. Streuby and the preceding witnesses testify to the wholesomeness of the water, it means that the water is wholesome and good.

Sixth: J. Voewinkel, who has been chief of the fire department of Vicksburg for many years, and necessarily associated with the water company, tells the court that from actual experience with this water from the installation of the plant, he knows that it is good and wholesome. He has used it for manufacturing purposes and has drank the water from the hydrants without any filteration, and he prefers it that way. He has cistern water, but he knows that the river water is more wholesome.

The seventh witness as to the wholesomeness of the water is Dr. H. H. Haralson, with as large and as varied practice as any physician in Vicksburg, and one who has lived in different parts of the State and had wide experience with diseases conveyed by drinking water, tells the court that in all cases where patients have been afflicted with diseases conveyed by drinking water, they have used cistern water. He says that in over fifty

cases of typhoid fever treated by him in Vicksburg, not one of his patients used waterworks exclusively, and the majority of them used cistern water exclusively. Could evidence be stronger? He says that the unfiltered water, as he knows from actual experience in the practice of his profession, was as welcome as the filtered water.

Eighth: Prof. Metz, the highest authority of the United States obtainable upon the possibility of water, tells us that the unfiltered water of the Mississippi River at Vicksburg is wholesome and especially so, after it has been settled in the settling basins of the complainant; and he proves it by the highest and most unexceptionable standard of analysis. There being no evidence to the contrary offered by the other side. The evidence of these men must be taken as conclusive.

Appellee calls special attention to the fact, that the City laid great stress on the *unwholesomeness* of the water. The Water Company took exhaustive proof on the wholesomeness of the water and proved that it was furnishing good wholesome water by experts and a great number of the best citizens as just enumerated above.

The City asked *ONE* of its witnesses if he knew whether or not the Water Company was furnishing good wholesome water. His answer was that he could not say whether it was or not. This witness was the Mayor—W. L. Trowbridge, one of the most persistent fighters against the Water Company.

Upon such proof as this, upon one of the most vital points in issue, together with the "onerous and extortionate rate" question heretofore referred to, without a single word of proof on either one of them, it must occur to the Court's mind that this is a frivolous appeal and taken for delay only.

We find in the Anglo-American Provision Co. vs. Davis Provision Co., No. 2, 191 U. S. 376. On the construction of the Act of March 3, 1891, of the right to

appeal direct from the Circuit Court to the Supreme Court, is in principle, directly in point with the views we first took in this brief, that is, that no reasonable construction could be placed on the Act of March 3, 1891, authorizing an appeal to the Supreme Court, direct from the Circuit's decree on the merits of the case, without some constitutional or jurisdictional point being involved. No such questions are now involved in this case.

The assignment of errors, as before stated, do not attempt to raise a constitutional or jurisdictional point, but a question of fact, [together with minor pleadings which were in the discretion of the lower court.] The court says in the case just cited, 191 U. S. 376. "The argument for the appellant is devoted not to any constitutional or jurisdictional point, but to an attempt to upset the decision of the Circuit Court upon the question, mainly of fact.—The provisions of Section Five of the Act of 1891, were not intended to be made an instrument for such attempts." The appeal was dismissed.

We respectfully submit that the appeal in this case should likewise be dismissed.

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